SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

Civil Division

Central District, Stanley Mosk Courthouse, Department 12

20STCV26828
MARCOS RAMIREZ BANDA vs CENTRAL FORD AUTOMOTIVE, INC., A CALIFORNIA CORPORATION DBA CENTRAL FORD, et al.

July 13, 2022
1:15 PM

Judge: Honorable Barbara A. Meiers
Judicial Assistant: None
Courtroom Assistant: None

CSR: None
ERM: None
Deputy Sheriff: None

APPEARANCES:

For Plaintiff(s): No Appearances

For Defendant(s): No Appearances

NATURE OF PROCEEDINGS: Ruling on Submitted Matter

The Court, having taken the matter under submission on 05/17/2022 for Hearing on Motion for Attorney Fees, now rules as follows:

The Court having issued its written "Ruling" on 07/13/2022 in keeping with that "Ruling" Plaintiff is to recover attorney fees in the sum of $8800.00 and costs in the sum of ($435.00 total of $9235.00),

The Court orders the Complaint filed by MARCOS RAMIREZ BANDA on 07/16/2020 dismissed without prejudice.

The Court retains jurisdiction to make orders to enforce any and all terms of settlement, including judgment, pursuant to Code of Civil Procedure Section 664.6.

Clerk is ordered to give notice.

Certificate of Mailing is attached.

Los Angeles Superior Court, Dept. 12
111 North Hill Street
Los Angeles, Ca. 90012
(213) 633-1012

FILED
Superior Court of California
County of Los Angeles
JUL 13 2022
Sherri R. Carter, Executive Officer/Clerk of Court
By: R. Karapetyan, Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MARCOS RAMIREZ BANDA, aka MARCOS RAMIREZ

Plaintiff,

vs.

CENTRAL FORD AUTOMOTIVE, INC et. al.

Defendants

CASE NO. 20STCV26828

RULING ON PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS

The court having taken judicial notice of the files and records of the case and considered all of the moving and opposing papers relating to the matters before it, now rules on the Plaintiff's Motion for Attorney Fees and Costs as is set forth and explained herein.

July 13, 2022

Hon. Barbara A. Meiers

Barbara A. Meiers, Judge of the Superior Court

RULING ON PLAINTIFF'S MOTION FOR ATTORNEY FEES AND COSTS

PREFACE:

The matter before the court is a Motion for Attorney fees filed by plaintiff's counsel after the settlement of a Song-Beverly Consumer Warranty Act ("Song-Beverly" or the "Act") action, but the problem is that this case appears to be an action that should never have been filed.[1] Unfortunately, the indications are that this is an action that may have been brought in bad faith. The court does not wish to reach such a conclusion but it is hard to avoid when the complaint and statements under oath from the plaintiff and his counsel are contradicted by the hard evidence before the court. Here, the pertinent facts are that the defendant Ford, was presented with a request by a car buyer, the plaintiff in this action, to take back the car in issue because it purportedly had problems that justified a return. The defendant agreed and promptly offered to take the car back or issue a refund ("restitution") at the buyer's option, but after the buyer, Mr. Banda, came to be involved with the law firm of Knight Law Group, LLP ("Knight") , in lieu of simply following up on the manufacturer's efforts to accept the return, Knight filed this still pending lawsuit alleging that Ford willfully failed and refused to take back the car, etc. and forced Ford to go through about 2 ½ years of litigation before finally allowing Ford to accomplish what it tried to do before any litigation at all, i.e., comply with its duties by accepting the return and/or repayment that it had offered in the first place.

THE APPLICATION OF HANNA V. MERCEDES BENZ USA (2019) 36 Cal. App.5th 493

The *Hanna* case, a Song-Beverly attorney fee case, cited in the caption above, contains the following finding that: "Where a party continues to litigate after receiving a settlement offer, absent a finding that failure to resolve the case through negotiation was unreasonable or solely attributable to counsel's desire to generate more fees...fees ...are properly included in an award of fees. Under Civil Code section 1794." In this case, this court finds and holds that the fees incurred by the Knight firm were "unreasonable" and "solely attributable to counsel's desire to generate more fees." Therefore, regardless of the court's reluctance to itilize such harsh terms as "bad faith" and "spurious claims," this statement is the bottom line as to the court's conclusions as to what has prompted and been driving this entire action, meaning that under *Hanna*, no fees at all need be awarded.

As is more thoroughly explained below, the court has, nevertheless, decided to award some limited fees related to its view that some specific types of fees might be found to be justifiable, at least in a case where a defendant has agreed to pay some reasonable fees and costs, to

[1] The court notes here that what follows is by necessity based on what the court has before it in the files and records of the case which means that there might be other factors to justify the handling of this case which are not before the court.

compensate the consumer's counsel for those reasonable fees that might be reasonably incurred to assist a consumer to avail itself of the return of the car policies under the Act.

ASIDE FROM THE RULING IN HANNA THAT A COURT CAN DENY FEES ALTOGETHER IN SOME CIRCUMSTANCES, WHERE SUCH A DENIAL IS NOT GOING TO BE MADE, A COURT CAN GENERALLTY CONSIDER "INFORMAL - SETTLEMENT"- TYPE OFFERS" IN RULING ON FEE AWARDS

If one looks to the cases cited by the defense in Exhibit D hereto, including the cases of *Dominguez v. American Suzuki Motor Corp.* (2008) 160 Cal. App.4th 53 and *Rupay v. Volkswagen Grp. Of Am. Inc.* 2012US. Dist Lexis 180404, plus *Rupay v. Volkswagen Group of Am. Inc.* 2012 U.S. Dist LEXISS 180398 (C.D. Cal. Dec. 17, 2012) as well those additional cases in defendant's Supplemental filing re the attorney fee motion it appears that summary judgment rulings in the defendants' favor in pre-litigation acceptance- of -return cases such as this may result in the end of attorney fee issues coming up in cases such as this; [2] but, until then **this court has noted no case that has definitively ruled on exactly what effect a pre-litigation manufacturer's appropriate consent to a return should be found to have on awards of attorney fees in Song-Beverly cases or even the extent to which such offers are to be considered in rulings on fee issues in these matters.** There are some that discuss whether evidence of informal settlement efforts if to be considered in ruling on attorney fee issues but that is not what an agreement to comply with a statutory duty to accept a car return is. These manufacturer duties are a matter of law and a failure to perform them is an element of a plaintiff's case to be proven in trial. If the request to return is properly accepted, the question properly defined is then what fees if any a plaintiff is to receive if they simply the refuse to avail themselves of the opportunity and/or respond with the filing of suit, regardless of the soundness of the offered acceptance, and, that being the case, cases where the manufacturer has been prevented from accomplishing the return fee issues cannot be the same as in cases involving either CCP 998 "offers' or other types of "settlement" cases.

That is, other than the fact that in all these cases, as in all attorney fee cases under the Act, the buyer-plaintiff has the burden of proof to establish that the fees incurred were in fact "reasonably necessary" to the conduct of the litigation and were "reasonable" in amount, and that has never been proven or even attempted to be proven in this case other than by the single explanation offered in an erroneous (or "false") Kronos Declaration discussed infra. .

This court believes that in the special circumstances of this case, just as in "informal" settlement cases, the law is clear that the factors considered herein may all be considered. In

[2] Meaning that if cases end up consistently ruling that cases such as this will rapidly conclude on summary judgment motions, and manufacturer's counsel do not, nevertheless, enter into settlements, there will probably be no need to address attorney fee issues in these future pre-litigation acceptance cases.

the case of Etcheson v. FCA US LLC (2018) 30 Cal. App.5th 831, 846-847, the court speaks of conflicts between courts as to whether and to what extent such matters can be considered and concludes that particularly if there is a disparity between settlement offers and the amount recovered at trial, "the trial court may properly consider the settlement offer in evaluating the benefit of the attorney's services at trial."

In summary, this court is of the view that this is not a section 998 situation and it is not an "informal settlement" offer, but this court is clearly permitted to consider that the ignoring of a pre-litigation attempt to do its duty by a manufacturer in order to pursue litigation with no justification plus the public policy considerations set forth herein are definitely to be considered and factored into the court's ruling on the attorney fee request in this case along with all of the other facts and circumstances before this court.

IMPROPER PURPOSES

This court's finding (having now reviewed the entire action as a result of the attorney fee motion now pending) is that there seems to be no possible plausible explanation that could be advanced for why this action was filed and pursued other than that its purpose was not to help the plaintiff, but to generate attorney fees for plaintiff's counsel or "coerce" an extraordinarily large "fee" from Ford for granting it the privilege of being allowed to finally perform those duties assigned to it under the Act that it had tried to fulfill even before any attorneys or litigation became involved. Accordingly, perhaps the wrong issue is now before the court and the issue ought to be whether or not sanctions should be being ordered against the plaintiff and for how much, and not how much the Knight firm should be awarded, or more aptly be rewarded, for its conduct of this ostensibly bad faith case-- harmful to the courts, to Ford, to Knight's own plaintiff and in violation, as explained below, of the public policies which are supposed to govern every aspect of Song-Beverly cases.

Everyone involved with Song-Beverly litigation has to be well aware of the fact that what a plaintiff is entitled to recover in a Song-Beverly case is, as set forth in Civil Code ("CC") section 1794 and the other sections cross-referenced therein, basically just a return of the car or restitution for its cost and related expenses, (or if the case has gone to trial, damage amounts corresponding to these recovery rights) if the plaintiff can prove that a manufacturer failed to comply with the law and offer a car return or "restitution" payment when a "defective" car was presented, plus, of course, attorney fees and costs. And in those cases where the plaintiff can also prove that this failure to perform the manufacturer's duties was willful, a plaintiff buyer can also recover twice this basic damage amount, again plus attorney fees and costs, thereby turning a $40,000 case into an $80,000 case, and with the attorney fees awarded potentially assessed at even higher rates and in greater amounts as justified by the

potential need for prolonged litigation to gather evidence, the increased complexity of the litigation and difficulties of proof.

Therefore, to be able to garner a substantial amount of fees or possibly any fees at all, a plaintiff and his or her counsel must present a Complaint that alleges problems with a vehicle sufficient to justify a return, etc.; a manufacturer's improper refusal to accept that return despite the problems, and, in order to obtain civil penalties and thereby greatly increase the value of the case and the potential range of fees at the end, additional allegations that the alleged refusal to perform the manufacturer's duties was "willful,' meaning generally or essentially intentional and in bad faith. Therefore, that is exactly what was filed in this case, despite Ford's efforts to take the car back even before the Knight firm's involvement. In this regard, the Complaint here alleges that, in paragraph 25, "Notwithstanding Plaintiff's entitlement, Defendant FORD has failed to either promptly replace the used motor vehicle or to promptly make restitution in accordance with the Song-Beverly Act," with this followed by additional allegations in paragraph 56 that "**Plaintiff is entitled in addition to the amounts recovered, a civil penalty of up to two times the amount of actual damages in that FORD has willfully failed to comply with its responsibilities under the Act,." [Emphasis added.]**

However, in this case, even though all of these claims of violations of the manufacturer's duties were alleged (as necessary to support any recovery against Ford), none of them have been proven to be true, with even an issue presented looking to the facts of the case as to whether or not Knight may have ever even believed them to be true. As is more fully documented in the section below designated as "Defendant's Motion for Summary Judgment" ("the MSJ"), the inaccuracy of all of the plaintiff's claims was ultimately established in the MSC filings that the defendant was forced to file in this case, with one of the most compelling points as to possible "bad faith" being that months before Knight filed this lawsuit seeking civil penalties against Ford for alleged "willful" violations of the Act, it had already been informed in another suit involving Ford and the Knight firm that as a matter of law, no plaintiff could lawfully file or pursue any suit for civil penalties against Ford, and yet the Knight firm filed with suit anyway.

With regard to that earlier case, in November 2019 a federal court in the *Nunoz* case (see the decision in Exhibt C hereto) held, *inter alia,* that civil penalties could be not claimed against Ford in that (or any other action for that matter) because Ford had complied with Civil Code section 1794 ((2) which provides that: "If the manufacturer maintains a qualified third-party dispute resolution process, which will substantially complies with Section 1793.22**, the manufacturer shall not be liable for any civil penalty pursuant to this subdivision."** [Emphasis

added.][3] Yet, despite this knowledge, the Knight firm nevertheless filed this action making claims for such penalties but also thereafter steadfastly refused to consider any settlement short of about $70,000 to be paid by Ford—a completely unreasonable amount that presumably would have never even been suggested absent such a threat of civil penalties since the car (see below) had a purchase price of only about $23,000 some years before which is usually the basic measure looked to as a basis for damages in cases under the Act.

The rest of the proofs submitted by the defendant in its 2021 Motion for Summary Judgment ("MSJ"), just as definitively demonstrate that the rest of the claims to the effect that this manufacturer "willfully" failed to replace or repay for the car were equally unjustified, in that they demonstrate that on the facts of this case that this defendant had done all that it could to do to accomplish that end, only to have the Knight firm frustrate its efforts; and yet, regardless of all of this, in 2022, the Knight firm has, presumably intentionally, continued to repeat its now demonstrably false or 'erroneous" claims in a Declaration under oath from plaintiff's counsel (the Kronos Declaration) in support of its claim for over $70,000 in fees and costs.

PLAINTIFF'S VIOLATIONS OF PUBLIC POLICY IN RELATION TO MOTIONS FOR FEES

Case law is replete with references to the fact that plaintiffs' fee requests in Song-Beverly cases must be treated liberally because public policy encourages the bringing of actions under the Act given the fact that consumer rights and defective vehicles are in issue (Dagher v. Ford Motor Co. (2015) 238 Cal. App.4th 905); but there is another public policy which in some cases will support an opposite treatment based on another more important policy that, in this court's view, overrides all other considerations. That policy is enunciated in the case of *Martinez v. Kia Motors America, Inc.* (2011) 193 Cal. App. 187, 195 with the import of that decision being that courts in ruling on issues arising under the Song-Beverly Act must never make rulings that countermand and/or undermine the public policies underlying the Act, and specifically the policy that no decisions are to be rendered that may encourage litigation and/or serve to discourage dealers and manufacturers from doing their duty to take back defective vehicles when first requested to do so, before litigation, and, if possible, even before a consumer must obtain counsel. In other words, if a plaintiff has to litigate and has brought a bona fide suit and prevailed, fees are to be liberally awarded, but that is only if the plaintiff has been forced into successfully employing this litigation tool of "last resort."

[3] It is perhaps worth noting that this provision of the Act was clearly created and instituted in the hope that it would encourage manufacturers, in order to avoid litigation, to set up what would serve essentially as a form of arbitration system, This provision is in keeping with the underlying public policy reflected in the Act which is that remedies, such as prompt responses to a buyer's effort to return a car, are to be encouraged and litigation used only as a last resort because it is so potentially harmful to the consumer. See the *Martinez* case, cited *infra.* However, the Knight firm, ,despite knowing of this alternative dispute resolution system set up by Ford, also chose to bypassed it by its election to file suit.

Liberality in setting fees in those cases is in keeping with the policies of the Act. But if an attorney has caused litigation to ensue and/or be pursued when it is inappropriate and unnecessary, that poses a wholly different scenario, given that such actions violate the policies underlying the Act.

The *Martinez* court set forth these public policy considerations in the course of addressing the responsibilities of manufacturers under the Act, focusing first on Civil Code ("CC") sections 1793.2 and 1793.4 which outline a manufacturer's duties and provide for the liability of manufacturers if a manufacturer fails to comply with its duty to "promptly replace the ...motor vehicle... or promptly make restitution to the buyer...." The decision then goes on to discuss the policy considerations that support the Act, saying in this regard that "The Act 'is manifestly a remedial measure, intended for the protection of the consumer; it should be given a construction calculated to bring its benefits into action... [citation omitted.]." This statement as to underlying policies of the Act was in response to the fact that the the defendant motor company was arguing in that case that the Act should be interpreted as requiring a plaintiff to continue to possess the vehicle in order to proceed with suit. The court's response was to reject any such interpretation, saying as to this defense argument: "To read into the statute an unexpressed requirement that the consumer possess or own the vehicle as a condition to obtaining relief **would have a chilling effect on** the availability of the Act's remedies. **If a manufacturer refuses to comply with its obligations under the Act to repair a defective vehicle, the buyer may have to spend years in litigation pursuing his or her remedies under the Act;** if a buyer who had financed the purchase of the car must retain ownership of the unusable vehicle throughout this time, he or she will need to continue paying for the derelict vehicle as well as any replacement vehicle. Faced with this situation, many consumers would reasonably do just what plaintiff did here—discontinue the payments and allow the vehicle to re repossessed...Not only is this inconsistent with the pro-consumer policy supporting the Act, but it would encourage a manufacturer who has failed to comply with the act to delay or refuse to provide a replacement vehicle or reimbursement; **any delay increases the likelihood that the buyer will be forced to relinquish the car to a lienholder. Interpretations that would significantly vitiate a manufacturer's incentive to comply with the Act should be avoided.** (citing *Jiagbogu v. Mercedes Benz USA* (2004) 118 Cal. App.4th 1235, 1244.)" [Emphasis added.]

Nothing could be clearer than that this court was highlighting a dual public policy underlying the Act, the first being that courts are to interpret and apply the Act to discourage litigation because of the serious potential harm to consumers if forced to take that route, and second that courts, in their approach to Song-Beverly issues, are to in their rulings adopt those which will serve to encourage manufacturers to comply with the Act's dictates and policies and to readily accept car returns as appropriate to accomplish the goal of discouraging litigation--with that remedy only to be a last resort.

The *Martinez* court additionally summarized that it was rejecting the position being advocated by the defendant because: "Defendant's construction of the statute is calculated to allow the manufacturer to sidestep the protections afforded the consumer by the Act and encourage 'the manufacturer's unforthright approach and stonewalling of fundamental warranty problems." Id at 195, citing *Krotin v. Porsche Cars North America Inc.* (1995) 38 Cal. App.4th 294, 303. (Also, *Kwan v. Mercedes Benz of North America, Inc.* (1994) 23 Cal. App.4th 174.)

The conduct of plaintiff's counsel has been shown to have been in direct contravention of all of these policies as articulated in *Martinez. In* this case it is Knight that has "sidestepped the protections afforded the consumer under the act." Knight has caused its client to have to risk repossession and in the end to hold onto and perhaps continue to drive a potentially dangerous vehicle for approximately 2 ½ years with no reason or "good excuse" for doing so, i.e., with absolutely no potential benefit to this consumer and with the only potential benefit being to the Knight firm, to wit the amount excess of $70,000 coming from Ford which it originally sought to obtain through unreasonable settlement demands and which it is now coincidentally seeking in approximately the same amount as attorney fees.

Instead of helping this consumer client and Ford to quickly proceed and conclude a pre-litigation rapid take -back of the car (or restitution at the choice of the buyer), the Knight firm filed suit claiming with no justification for its claims of a "willful refusal" to take back the car, etc. (clearly insupportable on the facts of this case) and then refused to consider any settlement that would have enabled this plaintiff to get out of the apparently faulty car short of receipt of this $70,000 from Ford (for a $23,000+ car) until it suddenly settled for essentially what Ford had offered before the lawsuit even began, $30.000 plus fees. As is more fully discussed below, there appear to be no reasons for this turn around other than those factors noted below, all of which, in the absence of any other explanation, seem to require an interpretation of "bad faith."

As the *Martinez* case points out, in the usual case, a consumer will ordinarily ultimately be looking just at a recovery of restitution or a new car—the same as what Ford in this case offered immediately upon plaintiff's "pro per" pre-litigation request, but if actual "willful" bad conduct in in issue, a plaintiff might well chose to reject an pre-litigation offer to return or an early settlement offer, with the result that the prolonged litigation which is ordinarily to be avoided will be an acceptable price to pay for a plaintiff who is of the view that even in the end they might not succeed in a double recovery, manufacturers who are indifferent to the Act's requirements should understand that there will be consequences for the manufacturer, even if litigation must be pursued for the plaintiff to get there at some cost to the plaintiff. But that is not this case. There was no cause for prolonged litigation here.

In a case such as this when a party has no good cause whatsoever to believe that any willful bad conduct on the part of the defendant has occurred, the filing of such a suit can only have that prohibited "chilling effect" that the *Martinez* court found to be violative of the purposes and policies of the Act in that it can only serve to discourage manufacturers and dealers from coming forward as quickly as possible to restore the consumer to the place that he or she has a right to be. One can only reasonably infer that a manufacturer repeatedly facing cases such as this in response to its pre-litigation offers to take back or pay for problem cars might well "ask itself" what point there is in attempting to establish expensive nationwide systems for car returns and for prompt processing, complete with customer service availability to service requests, when the result will only be repeated litigation regardless of what it might do. This is not to mention the harm to the consumer of being locked into potentially years of litigation in which attorney fees accumulate while the client suffers the danger of repossession and/or of being forced to continue to drive a potentially dangerous car, also in violation of the policies and purposes of the Act. In fact, it is interesting to note that it is exactly that specific potential of harm to consumers that the court cited in *Martinez,* to wit, the repossession of the consumer's car due to prolonged litigation, that was suffered by Knight's client in the *Nunez* case (see Exhibit C hereto) when Knight also chose to litigate even after Ford attempted to take back the car pre-litigation just as in this case.

When an attorney's conduct clearly violates the goals and policies of the Act, as, the court finds happened in this case, pursuant to *Martinez,* such conduct is clearly not to be encouraged by court awards of hefty attorney fees. In fact, Martinez seems to clearly say that it is a court's duty not to encourage behavior violative of the purposes and policies of the Act.

DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Turning to more specifics of the evidence appearing to point to bad faith in this case and what may have prompted plaintiff's sudden willingness to rapidly accept $30,000 instead of the over $70,000 of its previous settlement demands right after the defendant's MSJ, although the plaintiff has offered no explanation, the record reflects several persuasive and likely possibilities.

The first is that there are now cases that hold that if a manufacturer does perform its duties and offer to accept the car back or to provide a refund or "restitution" at the buyer's election, a plaintiff simply has no case, with corresponding judgments rendered in favor of the manufacturer with the end result being not only no recovery for the plaintiff but also no fees for his or her counsel. These cases were set forth in the defendant's MSJ papers with that filing attached as Exhibit D hereto. Seeing these cases , the plaintiff may have recognized that they might well result in a judgment for the defendant in this case.

The second factor that may have prompted plaintiff's rapid retreat appears in Exhibits A and B attached hereto which were also a part of the defense MSJ presentation (in the defense Exhibits to a Schultz Declaration). These documents demonstrate that, contrary to all of the plaintiff's allegations, Ford immediately responded to the plaintiff while he was self represented pre-litigation and made his request to Ford return the car with these letters showing not only that Ford was at all times not only "ready, willing and able" to promptly perform as dictated by the Act; but also that Ford had drafted documents that were clear and generous in the explanations offered as to how to proceed and as to what the consumer might choose to do. On their face, these documents clearly establish that all of the allegations in the complaint about this manufacturer having refused to do its duties and to accept a return or give repayment, etc. were untrue (or at the least "inaccurate"), including that Ford had in any way "willfully" refused to do its duty.

The third is that the defendant supplied the court in its MSJ papers with a copy of the decision from the *Nunez* case referred to above (Exhibit C hereto) which revealed, not only that the facts in that case were almost identical to those in this case, including a similar pre-litigation offer by Ford to take back the car, only to be met by a lawsuit from the Knight firm with similar claims made against Ford about "willful" refusals to accept returns and demands for civil penalties. It appears that there were also the same types of rather frivolous defenses to the summary judgment motion filed in that matter as were raised in opposition to the MSJ in this case such as that the plaintiff spoke Spanish and there were deficiencies in the notice of acceptance of a return, etc. On these parallel facts, Ford was, nevertheless, granted a summary judgment, with all of these defenses, including the additional one raised in both cases that there were some sort of amorphous "deficiencies," in the letters, rejected. The main import and therefore the effect of *Nunez* on the plaintiff's settlement offer to so promptly settled might, however, been **its reference to the fact that there could be no civil penalties assessed against Ford as a matter of law in this case.**

And finally, the MSJ presented those cases noted above (again to be found the earlier MSJ filing contained in Exhibit D hereto) in which lawsuits based on claims of "misconduct" after pre-litigation requests have been made and honored have been rejected.

Further details as to the factual and legal showing from Ford on the MSJ are probably unnecessary at this point, but just to fill out more details as to what the court has considered, the MSJ record also demonstrates (see inter alia the MSJ Declaration of Robert A Schultz) that the plaintiff purchased a car on July 13, 2018 for $23,485.46. He claimed problems in his Answers to Interrogatories relating to alleged transmission problems when shifting gears plus a rear end clunk and some steering and other issues. Possibly after a consultation with counsel, but with no litigation yet involved, plaintiff personally asked Ford to return the car on July 25,

2019 about a year after purchase. The defendant promptly agreed and, per plaintiff's deposition, sent him paperwork dated August 5, 2029 to accomplish this end followed by a second letter on September 6, 2019 to the same purpose. (Exhibits A and B hereto). Thereafter there were some communications in October of 2019 when plaintiff claims he encountered problems connecting with Ford such that communications allegedly broke down.

It appears that plaintiff's counsel was either already involved or became involved very shortly thereafter, but instead of contacting Ford to move forward with and conclude the car return, the Knight firm instead filed suit. As to why this was the case, the only explanation appears in the plaintiff's Answers to Interrogatories at page 71 thereof where the assertion is made that: " **Despite its legal obligations to promptly replace the new motor vehicle or promptly make restitution in accordance with the Song Beverly Consumer Warranty Act, Defendant willfully refused to offer either remedy to Plaintiff.**" [Emphasis added]. This claim was made under oath, but looking at the letters attached as A and B hereto from Ford to plaintiff, Mr. Banda, and other MSJ evidence, this statement, presumably drafted by counsel, was completely untrue. Whether the plaintiff or defendant had produced these letters to Knight by the time these Answers were provided is unknown, **but Knight definitely did know of this untruth when it repeated the same incorrect claim again in an attorney's Declaration in support of plaintiff's Motion for Attorney Fees as discussed infra (the "Kronos Declaration").**

It is worth noting that the first response letter to plaintiff's "pro per" request to return dated August 5, 2019 (Exhibit A hereto) unequivocally states: "Ford Motor Company is extending a conditional settlement offer to either repurchase or replace your vehicle." It then goes on to say, "Keep in mind if you have a current preference for a repurchase or replacement transaction, you can always change your mind later. Ford RAV Headquarters will contact you within 48 to 72 hours to further discuss these options available to you." The exhibits show that this was followed almost immediately by the second letter, noted above, on September 6, 2019 letter (Exhibit B) which was even more lengthy and detailed with information as to how the parties might "get the ball rolling." On their face, these letters again, belie the factual assertion made under oath in the interrogatory answers which stated that, "Defendant willfully refused to offer either remedy [referring to a return of the car or restitution to plaintiff," and they also lend no conceivable support for the plaintiff's factual and legal claim that they constituted a "deficient repurchase offer."

By contrast, in response to the MSJ, plaintiff did not controvert any of defendant's claims (at least the court did not note any specific contradictions), and, plaintiff's Opposition papers were generally frivolous. They relied on arguments such as that the offers made were inadequate because they failed to include a specific "restitution" figure and that the plaintiff

speaks Spanish and therefore "could not respond" (but coupled with an inconsistent claim that the plaintiff did respond) and never even mentioned the fact that plaintiff immediately or almost immediately had counsel to assist him; but even more importantly, they included the astonishing claim that Ford **failed to show a prompt response** to the plaintiff's July 25, 2019 request for a car return, despite the fact that Ford's first response was a mere 10 days after the request, of August 5 as proven by the defendant's exhibits hereto, Exhibits A and B.

MORE BAD FAITH

One would think that the production of Exhibits A and B hereto would have put an end to any additional claims **about Ford having willfully failed to cooperate in a car return,** but they did not. Incredibly, in this court's view, in support of the now pending Plaintiff's Motion for Attorney fees and clearly presented in order to attempt to justify Kinght's overall claims of a well-founded "difficult" case requiring a major effort and staffing, etc. Knight again submitted a document under oath, this time a Declaration of Roger Kernos, Esq., in which he states, in paragraphs 7-9: "Plaintiff contacted FMC customer service directly on or about July 25, 2019 and requested a buyback. **Despite FMC's affirmative duty under the law to perform an investigation and offer relief, FMC refused to provide restitution in accordance with the Song-Beverly Act**." [Emphasis added.] The court has also noted with respect thereto that this same Declaration goes on to indicate that it was because of being "stonewalled" by Ford that Mr. Banda then consulted with the Knight firm, even though there is, as the court recalls, other evidence in the record that plaintiff actually consulted with the firm before making his request for help from Ford and there is also a claim that there was a specific request for restitution made by Mr. Banda, but the court has not found that request in the record. It is hard to try and overlook conduct of this sort in evaluating a possibility of bad faith.

Finally on this point, plaintiff's counsel still seeks to rely on these claims in support of its fees but without any effort to explain how the court is supposed to reconcile a statement such as this with all of the contradictory evidence noted herein, much less the public policy aspects of the Act that have been ignored and contravened in this case.

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THE FEE AWARD

What this plaintiff's counsel should have done, and arguably was even duty bound to have done, both in the interests of the consumer and well as required by the policies underlying the Act, was to as quickly as possible sit down with Ford and work out the details of a car return or refund, or even, if the plaintiff wished, to let the plaintiff do so himself and simply

act in a reviewing and assisting capacity. There was no perceivable justification whatsoever on the record before this court for the filing of any lawsuit. The court is therefore left with the need to ascertain what the value of a reasonable representation by counsel would and should have been had Knight properly followed the proper course. By law, a court is to assess an amount to compensate for reasonable fees and costs incurred, but the course that Knight chose to follow was not reasonable in any respect, not only in terms of the very claims made, but also including all of their claims as to "reasonable" time allegedly put in or the fees charged up to the level of "specialists," or the number of attorneys involved, which as the defendant has argued were all neither necessary or reasonably to be employed, and especially for the simple car return that should have been involved.

Of course, before the court even gets to the "reasonableness" of what the plaintiff has claimed with regard to the work it says it put in, the court would first have to believe that the allegations made as to work done and time spent, etc. are accurate, but the court cannot and does not do so in this case. There are such serious credibility issues connected with everything in this case, including but not limited to the Kronos Declaration noted above, and the claims made without, in this court's view, any legitimate support, that the court cannot hope to separate the "wheat from the chaff" with the result that the court has reacted to the plaintiff's submissions in support of its fee motion as not being credible overall, whereas the Ford claims and argument do not present the issues of possible intentional disingenuousness that now permeate the plaintiff's papers.

However, all of that is somewhat unimportant unless one reaches the "alternative" fee award discussed at the end of this ruling, for, as noted at the outset of this ruling, this court is not inclined to accept or use the proposed fee amounts submitted by either side in part because no party has even considered the important public policy issues triggered by this case, not to mention the unmeritorious nature of the action from the outset and how these factors should or might affect the plaintiff's $70,000+ fee and cost request.

Having said that, the court has outlined what it finds a reasonable legal representation should have consisted of in terms of the task to be properly undertaken by counsel where a pre-litigation offer to afford relief has been made by the manufacturer and help is needed to assist with the return. As to that, this court is of the view that every consumer should have a right to counsel to assist in a vehicle return. [4] Therefore, based on this judge's many years of

[4] In this regard, to the extent that there is no clear and explicit provision in the Act to provide for consumers to employ counsel at the manufacturer's expense to assist in the pre-litigation of vehicles and related matters or in the "quasi-arbitration" process noted above, in this court's view such provisions are essential if the policies of the Act discussed herein to promote pre-litigation returns and third-party intervention in order and to thereby avoid litigation provisions are essential even if legislative change is necessary to make the availability of counsel at no cost to the consumer clear. Case law to date has declined to find any right to fees for help in accomplishing a pre-litigation car return. Dominguez (2008) 160 Cal. App.4th 53.

practice and on the bench, for Knight to have assisted with a return of the car, the court finds that it should have taken no more than 32 hours to accomplish, that is to say, 4 days of 8-hours- a- day effort, either day to day or spread out. This comes to a total of $8,800 when 32 hours is multiplied by a "lodestar" of $275 per hour.

This hourly fee rate of $275 has been derived based on the following considerations. Looking to what the Knight firm has presented as to time allegedly spent by various attorneys and their claimed billing rates, the court has accepted the claim that Armando Lopez put in (by a large margin) the most time on this case as opposed to time attributed to other Knight attorneys, purportedly about 54 hours, and did so at rates ranging from $200 per hour to $325 per hour with $275 being Mr. Lopez' mid-term, 2021 rate, and, although he was a less experienced attorney than some, in the court's view, given that this law firm has undoubtably handled innumerable car returns as well as post-litigation settlements, the simple matter of discussing and negotiating (if negotiating would have even proved necessary with this willing manufacturer car recipient) a pre-litigation return of the car (or refund) would have certainly been well within Mr. Nunez' capabilities, especially given that there were other attorneys available for questions.

Therefore, the court has not used Mr. Lopez' lowest lodestar rate of $200, and has instead used his 2021 higher rate of $275 and multiplied that by the 32 requisite hours for a total of attorney fees reasonably (or which should have been reasonably) incurred of $8,800. As to costs, only one cost that might be even possibly justified would have been the cost of the filing of the Complaint , $435, which some conservative practitioners might possibly do to protect against future statute of limitations issues, but to be clear, this amount is awarded because, and only because, Ford stipulated to allow this plaintiff to be found to be a prevailing party and as such "entitled" to costs. Combining these amounts, the total award comes to $9235.

Finally, as may be surmised from the above, from what the court has before it [5] and the similar types of cases that Ford has cited, Ford has been shown to have been making an attempt to do everything right. It has per the *Nunez* case, set up a third-party resolution

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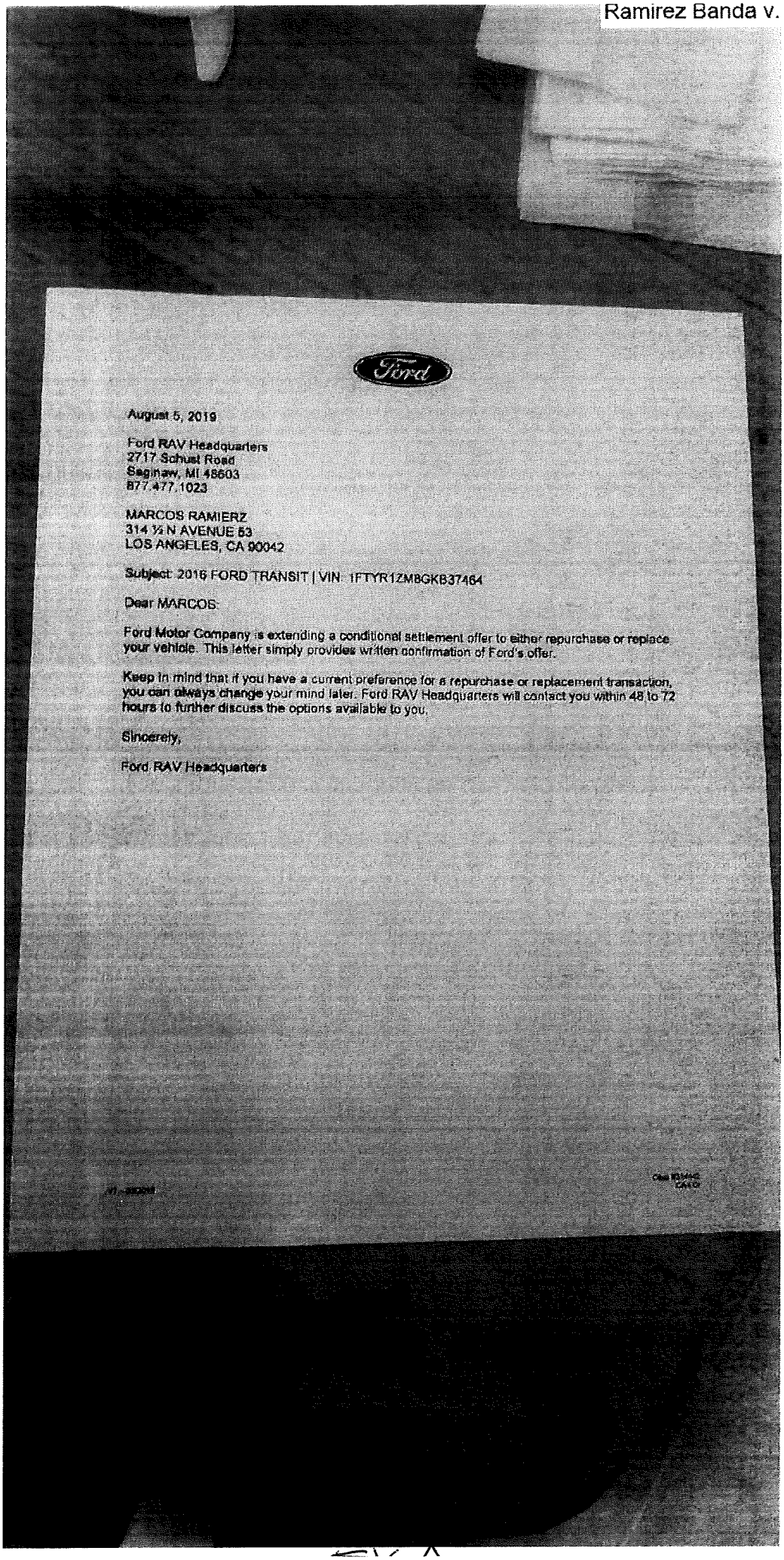
[5] At page 5 of the defense papers, the defendant has claimed that some of the other cases similar to this and cited in its briefs also involved Ford and similar pre-litigation offers to settle where the conduct of Ford was essentially the same as in this case. As to the only case cited by the plaintiff in support of settlement or pre-litigation return efforts, this court finds the plaintiff's reliance on the case of Gezalyan v. BMW of North America (2010) 697 F. Supp.2d 1168 to be misplaced. Although there was a pre-litigation offer in that case, according to that court there were many unacceptable terms and conditions. This court is not sure that it would agree but does not know enough about the facts, but it does know that the Gezalyan decision, like some others in this area, appears not to have considered the public policy mandates in the *Martinez* and other cases noted above. It is not binding on this court, it is not even an appellate decision, it cites no authority for its dismissive treatment of the manufacturer's pre-litigation efforts is given, etc. and therefore, this court declines to follow or apply it.

program; it has created form letters in order to promptly initiate car surrender efforts; it has promptly responded to requests deemed acceptable and agreed to surrenders, etc., and it has from the earliest reasonable time, at least in this case, continually continued to try and close this case on reasonable terms. All of this adds up to Ford responsibly acting to try and enable the plaintiff to get back into a properly serviceable safe car, whether obtained from Ford or not, completely in keeping with its duties under the Act and the public policies that require such conduct by sellers and manufacturers, etc. of cars. The conduct of plaintiff's counsel conduct has served the opposite ends.

But, should this ruling be appealed and an appellate court to disagree with the above, in the interests of time, the court now finds that were this court to completely disregard all of the policy and other considerations noted above, and focus just on the support provided for fees requested, the court finds the following with regard to an alternative ruling and notes: First, that it has given full consideration to Song-Beverly case law relating to the granting of fees in cases under the Act, as well as the leading cases relating to factors to be considered by trial courts generally in ruling on attorney fee issues, for example, those cited in the decision in Gorman v. Tassajara (2009) 78 Cal. App.4th 44 and PLCM Group, Inc. v. Drexler (2000) 223 Cal.4th 1084, including but not limited to lodestar considerations as well as all other pertinent factors; second, it has also included credibility considerations which are not necessarily a factor in the same way or to the same extent in some other cases; third, it has also considered and weighed all of the points and arguments of both sides, but now hereby incorporates by reference all of the defense points and arguments and supporting papers in Ford's Opposition filings and Supplemental filings submitted in response to the plaintiff's Motion for Attorney fees, including but not limited to its claim and supporting papers and arguments to the effect that, even had there been any colorable claim to press that Ford had somehow failed in its duties to take back the car, the Knight firm egregiously overstaffed this case and over litigated it. The court agrees that this was not a complex case, as the defendant has argued, and, in fact, in the court's view, plaintiff really has had no case to speak of at all. Plaintiff certainly did not need a slew of lawyers to present what plaintiff had , which as the court best recalls (although not important to the decision) only 5 visits made for repairs and not an extensive or complicated history of visits and car problems. . There was also no need shown for or offer of explanation as to why extensive depositions to prepare the case or for the incurring of many of the other costs should be honored, especially if potentially more complicated questions as to "willfulness" were never to be put before any judge or jury because all such claims were barred as indicated by the court in *Nunez* (which the plaintiff has never argued was erroneous on this point).

Therefore, the court submits as an alternative finding should its award of $8,435 be deemed to be in error, that the only alternative "reasonable fees and costs" that might be

potentially awarded in this case could only be properly assessed at the $17,356 in attorney fees which the defendant has viewed as tolerable plus costs of $7687.36 which is what remains after deducting some of those costs complained of in the Opposition (consisting of $1,333.30 for "other fees," $719.95 for attorney service for court filings where such filings can be accomplished through a e-filing system or regular mail, $$65 for "professional CMC," $635 for a court reporter where the cost was not incurred, and $533.35 for a trial cost when there was no trial), but with the defendant's other objections to cost denied. This would result in a total award of $18, 143.36.



August 5, 2019

Ford RAV Headquarters
2717 Schust Road
Saginaw, MI 48603
877.477.1023

MARCOS RAMIERZ
314 ½ N AVENUE 53
LOS ANGELES, CA 90042

Subject: 2016 FORD TRANSIT | VIN: 1FTYR1ZM8GKB37464

Dear MARCOS:

Ford Motor Company is extending a conditional settlement offer to either repurchase or replace your vehicle. This letter simply provides written confirmation of Ford's offer.

Keep in mind that if you have a current preference for a repurchase or replacement transaction, you can always change your mind later. Ford RAV Headquarters will contact you within 48 to 72 hours to further discuss the options available to you.

Sincerely,

Ford RAV Headquarters

September 6, 2019

RAV Case # 314442

Hello,

I have tried reaching you at (323)229-9067 regarding the buyback of your 2016 Ford Transit Van. I would like to go over the options available to you, make sure I have the correct information, and go through the documents needed to proceed with your case. Below are the options available to you for the manufacturer buyback. Please review these options, and call me at (877)477-1023x1914 with the option you would like to go with. Make sure you have your case number when you do call that way we can look up your information regarding your case. If you do not contact me by close of business (Eastern Standard Time) on Wednesday, September 11th, I will be taking the necessary steps to close your case.

Option One: Repurchase

- Ford Motor Company [FMC] will pay off your current lienholder after the vehicle is surrendered.
- You will be reimbursed for any down payments and payments, minus usage, negative equity, late fees, aftermarket contracts, items, or accessories (if they don't fall within the refund).
- Any payments made on the vehicle that are not included in the Repurchase figures will be refunded once the buyback is complete.
- You will remain responsible for any loan payments until the buyback is complete.
- If you choose to accept the Repurchase Option, a private offer will be provided to you which will allow for a discount on a new Ford vehicle (exclusions apply), if you choose to purchase another.
- Any questions about the repurchase option?

Option Two: Replacement

- Ford Motor Company [FMC] will pay off your current lienholder after the vehicle is surrendered.
- You will pick out a new Ford vehicle.
- (It does not have to be the same model, however it does need to be a new vehicle)
- You will remain responsible for the current loan balance, usage, and upgrade charges.
- If your vehicle is New, the upgrade cost would be the difference between the MSRP of your current vehicle and the new vehicle.
- If your vehicle is Pre-Owned, the upgrade cost would be the difference between the base MSRP of your current vehicle and the memo invoice of the new vehicle.
- Any questions about the replacement option?

Retention of Collateral

- This option is only available if your lender supports this type of transaction.
- You will keep your current loan and everything regarding your loan will remain the same.
- Same payments, same everything.
- You will be responsible for any usage, upgrade charges, and other out-of-pocket amounts.
- These amounts will be due at time of surrender in certified funds.
- There is no payment for retention of collateral?
- Do you have

EX B

EXHIBIT
0009
Marcos Ramirez Band
08-05-2021

Exhibit 6

Notice

- If you are considering a substitution or new-finance replacement, I highly suggest finding the vehicle you want to get into, but DO NOT sign any documentation or paperwork with the dealership.
- Dealerships will often encourage you to do so, or try to contract you, but that is not consistent with a manufacturer buyback.
- Only one vehicle can be chosen to calculate replacement figures.
- What I need from you once you choose a substitution vehicle, is the VIN and the name of the sales manager that you speak with at the dealership.
- We can assist with this process if this is the option you choose to go with.

Documents

In order to continue, I will request the following documents:

- Copy of Vehicle Registration (Must be current)
- Copy of Driver License
- Bill of Sale or Finance Contract from the original purchase of the vehicle
- Payment History with breakdown of interest and principle
- Payoff information with per diem and good through date
- Copy of title (if customer held state/paid off)
- Final Remarks

Turnaround time goal is about 30 days.

Dulik | Repurchase Coordinator
Acquired Vehicle Headquarters
[redacted]-1023x1914| F 877.489.3091
[redacted]@fordrav.com

NOTE: CHANGES MADE BY THE COURT

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

MILTON ALFREDO NUNEZ

Plaintiff,

vs.

FORD MOTOR COMPANY, a Delaware Corporation, and DOES 1 through 10, inclusive,

Defendants.

CASE NO. CV 18-9423-JFW (JCx)

STATEMENT OF DECISION REGARDING FORD MOTOR COMPANY'S MOTION FOR SUMMARY JUDGMENT

I. FACTUAL AND PROCEDURAL BACKGROUND

On October 15, 2017, Plaintiff purchased a new 2018 Ford Escape (VIN 1FMCU0F7XJUA31297) from David Wilson's Ford of Orange. (Docket No. 96-1 (Combined Statement of Facts ("CSF") at 1; Docket No. 75-1 (Amended Pretrial Conference Order ("PTCO")), Stipulated Fact ¶ 5(A).)

On October 30, 2017, Plaintiff brought the vehicle into Airport Marina Ford for repair due to overheating issues, and repairs were performed under warranty. (CSF at 2; PTCO Stipulated Fact. ¶ 5(H).)

On December 2, 2017, Plaintiff brought the vehicle into Ford of Montebello for overheating issues, and the dealership performed the necessary repairs. (CSF

EX C

at 3; PTCO Stipulated Fact ¶ 5(J).) The October 30, 2017 and December 2, 2017 were the only two times that Plaintiff brought in his vehicle for repair. (CSF at 4.)

Sometime in early 2018, Plaintiff's vehicle was repossessed after Plaintiff failed to make payments on his vehicle. (*Id.* at 5.)

On January 24, 2018, Plaintiff contacted Ford to request a repurchase or replacement of his vehicle. (CSF at 6; PTCO Stipulated Fact ¶ 5(M).) Shortly thereafter, on February 16, 2018, Ford sent Plaintiff a letter offering to repurchase or replace his vehicle. (CSF at 7; PTCO Stipulated Fact ¶ 5(N).) Plaintiff signed the letter, checked the box for repurchase, and sent it back to Ford. (CSF at 9; PTCO Stipulated Fact ¶ 5(O).) However, Plaintiff never provided Ford with the necessary documentation to allow it to calculate the amount of restitution necessary to make a final repurchase offer.[1] (CSF at 11; PTCO Stipulated Fact ¶ 5(P).) On March 16, 2018, Ford sent Plaintiff a letter advising that it had been unable to reach Plaintiff regarding Ford's offer to repurchase or replace Plaintiff's vehicle. (CSF at 8; PTCO Stipulated Fact ¶ 6(A).)

Plaintiff testified at his deposition that he was represented by counsel during the time period that he was in contact with Ford. (CSF at 10.) In fact, the offer letter that Plaintiff signed and eventually sent back to Ford included the fax number for the Knight Law Group, a well known and experienced Automotive Lemon Law firm, confirming his deposition testimony that he was represented by counsel. Plaintiff has not submitted any evidence to dispute that he was represented by counsel during his contacts with Ford.

On September 17, 2018, Plaintiff filed a Complaint against Ford, alleging that Ford breached its obligations under the Song-Beverly Consumer Warranty Act (the "Song-Beverly Act") and seeking civil penalties under the Act. (Docket No. 1-1 (Complaint).) In his Complaint, Plaintiff alleges claims for: (1) violation

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[1] Plaintiff admits that he stopped responding to Ford and rejected Ford's offer. (CSF at 13; PTCO Stipulated Fact ¶ 5(Q).)

of the Song-Beverly Act (Express Warranty); (2) violation of the Song-Beverly Act (Implied Warranty); and (3) violation of the Song-Beverly Act (Cal. Civ. Code § 1793.2).

II. LEGAL STANDARD

Summary judgment is proper where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party has the burden of demonstrating the absence of a genuine issue of fact for trial. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Once the moving party meets its burden, a party opposing a properly made and supported motion for summary judgment may not rest upon mere denials but must set out specific facts showing a genuine issue for trial. *Id.* at 250; Fed. R. Civ. P. 56(c), (e); *see also Taylor v. List*, 880 F.2d 1040, 1045 (9th Cir. 1989) ("A summary judgment motion cannot be defeated by relying solely on conclusory allegations unsupported by factual data."). In particular, when the non-moving party bears the burden of proving an element essential to its case, that party must make a showing sufficient to establish a genuine issue of material fact with respect to the existence of that element or be subject to summary judgment. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). "An issue of fact is not enough to defeat summary judgment; there must be a genuine issue of material fact, a dispute capable of affecting the outcome of the case." *American International Group, Inc. v. American International Bank*, 926 F.2d 829, 833 (9th Cir. 1991) (Kozinski, dissenting).

An issue is genuine if evidence is produced that would allow a rational trier of fact to reach a verdict in favor of the non-moving party. *Anderson*, 477 U.S. at 248. "This requires evidence, not speculation." *Meade v. Cedarapids, Inc.*, 164 F.3d 1218, 1225 (9th Cir. 1999). The Court must assume the truth of direct evidence set forth by the opposing party. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 507 (9th Cir. 1992). However, where circumstantial evidence is

presented, the Court may consider the plausibility and reasonableness of inferences arising therefrom. *See Anderson*, 477 U.S. at 249-50; *TW Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 631-32 (9th Cir. 1987). Although the party opposing summary judgment is entitled to the benefit of all reasonable inferences, "inferences cannot be drawn from thin air; they must be based on evidence which, if believed, would be sufficient to support a judgment for the nonmoving party." *American International Group*, 926 F.2d at 836-37. In that regard, "a mere 'scintilla' of evidence will not be sufficient to defeat a properly supported motion for summary judgment; rather, the nonmoving party must introduce some 'significant probative evidence tending to support the complaint.'" *Summers v. Teichert & Son, Inc.*, 127 F.3d 1150, 1152 (9th Cir. 1997).

III. DISCUSSION

In its Motion for Summary Judgment, Ford moves for judgment as to Plaintiff's claims under the Song-Beverly Act on two grounds. First, Ford argues that Plaintiff has failed to present any admissible evidence establishing that Plaintiff's vehicle had nonconformities that were not repaired after a reasonable number of repair attempts. Second, Ford argues that it promptly offer to repurchase or replace Plaintiff's vehicle after Plaintiff called and complained about his vehicle.

In his Motion for Partial Summary Judgment, Plaintiff moves for judgment on the ground that Ford determined that Plaintiff's vehicle qualified for replacement or repurchase under the Song-Beverly Act and, thus, Ford is equitably estopped from presenting any evidence or arguing that Plaintiff's vehicle did not qualify for repurchase or replacement.

A. Liability Under the Song-Beverly Act

The Song-Beverly Act provides in pertinent part:

> If the manufacture or its representative in this state is unable to service or repair a new motor vehicle . . . to

> conform to the applicable express warranties after a reasonable number of repair attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle . . .
>
> (B) In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer installed items installed by a dealer or the buyer, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.
>
> (C) . . . When restitution is made pursuant to subparagraph (B), the amount to be paid by the manufacturer to the buyer may be reduced by the manufacturer by that amount directly attributable to use by the buyer prior to the time the buyer first delivered the vehicle to the manufacturer or distributor, or its authorized service and repair facility for correction of the problem that gave rise to the nonconformity.

Cal. Civ. Code § 1793.2(d)(2)(A)-(C). Thus, in order to prevail on his Song-Beverly Act claims against Ford, Plaintiff must prove that (1) his vehicle had defects that affected the use, value or safety of the vehicle that Ford could not repair to conform to the applicable warranty after a reasonable number of repair attempts, and (2) assuming Plaintiff can prove his vehicle was not repaired after a reasonable number of repair attempts, that Ford did not promptly offer to

repurchase or replace Plaintiff's vehicle. *See Rupay v. Volkswagen Group of America Inc.*, 2012 WL 10634428 (C.D. Cal. Nov. 15, 2012).

As to the first prong, there is no dispute that Plaintiff brought his vehicle in for repair on only two occasions, October 30, 2017 and December 2, 2017, and that the dealerships returned the vehicle to Plaintiff after performing the necessary repairs. (CSF at 4.) Plaintiff admits in his Opposition that Ford was entitled to at least two repair attempts. (Amended Opposition at 11.) Ford argues that Plaintiff has not presented any admissible evidence that the vehicle was not actually repaired after the second repair because, shortly thereafter, the vehicle was repossessed.

In response, Plaintiff primarily relies on his expert, Thomas Lepper. However, Mr. Lepper admitted that because the vehicle was repossessed, he never had an opportunity to inspect Plaintiff's vehicle and, thus, he does not actually know whether the vehicle was repaired after the second attempt. (CSF at 16-17.) Notwithstanding this admission, Mr. Lepper offers various opinions on the repair issue based on his review of various repair orders.[2] However, the Court concludes that Mr. Lepper's conclusions are not based upon sufficient facts or data. In addition, Mr. Lepper failed to explain what reliable principles and methods, if any, he used to arrive at his conclusion that the second repair of Plaintiff's vehicle was ineffective. As a result, the Court finds that Mr. Lepper's opinions are unreliable

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[2] In his report, Mr. Lepper concludes that the second repair attempt at Ford of Montebello was ineffective because the manner in which the dealership diagnosed the engine issues and its ability to repair wiring harnesses back to the original equipment manufacturer's specification was unable to meet factory new standards. Specifically, based on his review of the repair orders, Mr. Lepper opined that there had been "multiple maintenance regimes" within the vehicle's electrical system and that the "repeated overheating and ineffectual repairs damaged the engine and will shorten it[s] service life." Declaration of Amy Morse, Exh. 14, page 3 (Docket No. 105-3).

and for the reasons set forth in the Joint Statement Regarding Plaintiff's Expert Witness Thomas Lepper Proffer, filed November 5, 2019 (Docket No. 73), those opinions are excluded under Federal Rule of Evidence 702.

Therefore, the Court concludes that Plaintiff has failed to satisfy his burden of presenting admissible evidence to create a triable issue that the vehicle was not repaired after a reasonable number of repair attempts, and, because the vehicle was repossessed, Plaintiff has not established that there were any issues after the second repair that substantially impaired the use, value, or safety of the vehicle. Accordingly, the Court concludes that Ford is entitled to judgment as a matter of law.[3]

As to the second prong, it is undisputed that Plaintiff called Ford to complain about his vehicle and requested a repurchase or replacement on January 24, 2018. (CSF at 6; PTCO Stipulated Fact ¶ 5(M).) After conducting a "good faith review," Ford offered to repurchase or replace the vehicle by letter dated February 16, 2018. (CSF at 7; PTCO Stipulated Fact ¶ 5(N).) Although Plaintiff received the letter, signed the letter, and returned it to Ford, it is undisputed that Plaintiff never sent Ford the information needed to effectuate the repurchase. (CSF at 7-13.) In fact, Plaintiff admits that he ultimately rejected Ford's offer. (CSF at 11, 13; PTCO Stipulated Fact ¶¶ 5(P)-(Q).) As Ford argues, other courts have concluded under similar facts that the manufacturer was entitled to summary judgment on the plaintiff's Song-Beverly Act claims based upon prompt offers to repurchase or replace that the plaintiffs rejected. *See Rupay*, 2012 WL 10634428, at *2 (granting summary judgment for manufacturer); *Gonzalez v. Ford Motor Co.*, Case. No. LA CV 19-00652 PA (ASx), at *7 (C.D. Cal. Oct. 23, 2019) (same).

[3] In addition, the Court concludes that equitable estoppel is not applicable in this case because Plaintiff has failed to present any admissible evidence to satisfy the elements of estoppel.

In his Opposition, Plaintiff argues that Ford's offer was deficient because it was in English and Plaintiff only speaks Spanish. (Amended Opposition at 18-21.) Plaintiff also raises other issues with the letter. (*Id.* at 16-18.) However, Plaintiff never raised these issues in response to Ford's offer or during discovery, and Plaintiff cannot avoid summary judgment by contradicting his sworn discovery responses or raising issues that should have been disclosed during discovery. *See, e.g., Yeager v. Bowlin*, 693 F.3d 1076, 1080 (9th Cir. 2012) ("'The general rule in the Ninth Circuit is that a party cannot create an issue of fact by an affidavit contradicting his prior deposition testimony.'") (citation omitted). Moreover, in *Gonzalez*, the court addressed an almost identical argument and found that "[o]n this ground alone, . . . Plaintiff cannot now argue Ford's offer to repurchase or replace Plaintiff's vehicle was somehow insufficient." *Gonzalez*, Case. No. LA CV 19-00652 PA (ASx), at *7. The Court agrees and concludes that Plaintiff cannot now raise arguments that contradict his sworn discovery responses in an attempt to defeat summary judgment.

Moreover, the Court finds Plaintiff's arguments unpersuasive. Plaintiff complains that Ford's offer letter was in English and not Spanish, but it is undisputed that Plaintiff checked the box for repurchase, signed the letter, and returned it to Ford (CSF at 9, 58). Plaintiff has also failed to produce any evidence that he ever called Ford or otherwise indicated that he did not understand the letter. Instead, the evidence clearly demonstrates that he checked the appropriate box for repurchase, signed the letter, and returned it to Ford, and, thereafter, for some unknown reason, he rejected Ford's efforts to complete the purchase of his vehicle. (CSF at 13; PTCO Stipulated Fact ¶ 5(Q).)

More importantly, Plaintiff also admitted at his deposition that he was represented by counsel at the time he received, reviewed, and signed the letter from Ford. (CSF at 10.) In fact, the offer letter that Plaintiff signed and eventually

returned to Ford included the fax number for the Knight Law Group, Plaintiff's counsel, which confirms Plaintiff's admission that he was represented by counsel. (Docket No. 78-4 (Plaintiff's Depo. at 37:21-23.) In the absence of any evidence to the contrary, if Plaintiff had any questions or difficulties in understanding Ford's letter, his very experienced counsel was available to answer those questions and fully explain his options before Plaintiff rejected Ford's offer. Importantly, Plaintiff has not disputed or submitted any evidence to contradict his testimony or Ford's evidence that he was represented by counsel. In fact, there is no declaration from Plaintiff or Plaintiff's counsel stating that Plaintiff was not represented by counsel at the time he received, reviewed, and signed Ford's letter agreeing to the repurchase of his vehicle, which explains why Plaintiff never argued in his Opposition that he was not represented by counsel during the relevant time period.

Plaintiff also argues that there were deficiencies in Ford's letter. In reply, Ford argues that Plaintiff never raised these deficiencies until he filed his Opposition to Ford's Motion for Summary Judgment. Moreover, Plaintiff's arguments are contrary to the law, and Plaintiff presents no admissible evidence that Ford made any improper deductions because he rejected Ford's offer without providing Ford the information necessary to make a final repurchase offer to Plaintiff. (Reply at 10-12.) The Court agrees and concludes, as the *Gonzalez* court held based on a nearly identical offer letter, that none of Plaintiff's arguments relating to Ford's letter have any merit.

The Court finds that the undisputed facts establish that Ford made a prompt offer to repurchase or replace Plaintiff's vehicle, and Plaintiff rejected Ford's offer. The Court concludes that these facts alone entitle Ford to summary judgment on Plaintiff's Song-Beverly Act claims.[4] *See Rupay*, 2012 WL

[4] For these same reasons, Plaintiff cannot prove his implied warranty claims. The Court also finds that Plaintiff has failed to present any admissible evidence

10634428, at *2 (granting summary judgment on express and implied warranty claims under the Song-Beverly Act); *Gonzalez*, Case. No. LA CV 19-00652 PA (ASx), at *7 (same).

B. Civil Penalties Under the Song-Beverly Act

Ford's Motion for Summary Judgment also seeks partial summary judgment as to Plaintiff's request for civil penalties under the Song-Beverly Act. Although the Court need not reach this issue because the Court finds that Ford is entitled to summary judgment on the underlying claims, the undisputed facts also establish that Plaintiff is not entitled to recover civil penalties under the Song-Beverly Act. "Civil penalties [are] authorized in limited circumstances by the Song-Beverly Act." *Rupay*, 2012 WL 10634428, at *2 (*citing Dominguez v. Am. Suzuki Motor Corp.*, 160 Cal. App. 4th 53, 60 (2008)). Under the Song-Beverly Act, the imposition of civil penalties is permitted under two distinct scenarios. First, under Section 1794(e), civil penalties may be awarded when the "manufacturer violates its express warranty obligations," or, second, under Section 1794(c), "when the manufacturer's non-compliance with the Act is willful." *Hatami v. Kia Motors Am., Inc.*, 2009 WL 1396358 at *4 (C.D. Cal. Apr. 20, 2009).

Civil penalties under 1794(e) are only available where, unlike this case, a manufacturer fails to maintain a qualified third-party dispute resolution process. "If the manufacturer maintains a qualified third-party dispute resolution process . . . the manufacturer shall not be liable for any civil penalty pursuant to this subdivision." Cal. Civ. Code § 1794(e). It is undisputed that at all relevant times Ford has maintained a qualified third-party dispute resolution process, which was disclosed in its written warranty materials. Therefore, because Ford "maintains a qualified third-party dispute resolution process," Plaintiff is precluded as a matter

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to prove any implied warranty damages (CSF at 18), especially in light of Ford's offer to repurchase or replace his vehicle.

of law from recovering civil penalties under Cal. Civ. Code § 1794(e).

Under the Song-Beverly Act, "[i]f the manufacturer or its representative in [California] is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle . . . or promptly make restitution to the buyer . . ." Cal. Civ. Code 1793.2(d)(2). Civil penalties apply when "when the manufacturer's non-compliance with the Act is willful." *Hatami*, 2009 WL 1396358, at *4. Under the Song-Beverly Act "a violation is not willful if the defendant's failure to replace or refund was the result of a good faith and reasonable belief the facts imposing the statutory obligation were not present." *Kwan v. Mercedes-Benz of N. Am., Inc.*, 23 Cal. App. 4th 174, 185 (1994). This "interpretation of section 1794(c) is consistent with the general policy against imposing forfeitures or penalties against parties for their good faith, reasonable actions" *Id*; *see also Gezalyan v. BMW of N. Am., LLC,* 2009 WL 10674231, at *2 (C.D. Cal. July 15, 2009) (noting that when there is "a good-faith dispute regarding [the manufacturer's] obligations under the Song-Beverly Act. . ." that "civil penalties are not an appropriate remedy in these circumstances.")

In this case, Plaintiff failed to satisfy his burden of presenting admissible evidence to establish that Ford violated the Song-Beverly Act or that any alleged violation was willful. On February 16, 2018, Ford offered to repurchase or replace Plaintiff's vehicle. Ford's offer was a permissible remedy that manufacturers are authorized to offer under Song-Beverly. "[I]f the manufacturer or its representative in this state is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of attempts, the manufacturer shall either promptly replace the new motor vehicle . . . or promptly make restitution to the buyer . . ." Cal. Civ. Code 1793.2(d)(2). Accordingly, the Court concludes that Plaintiff has failed to establish willfulness as a matter of law.

See Hatami, 2009 WL 1396358, at *5 (granting summary judgment on civil penalties based on offer to repurchase).

IV. CONCLUSION

For all the foregoing reasons, the Court concludes Ford is entitled to judgment as a matter of law as to Plaintiff's entire Complaint alleging claims under the Song-Beverly Act. Accordingly, Ford's Motion for Summary Judgment is **GRANTED** and Plaintiff's Motion for Partial Summary Judgment is **DENIED**. The parties are ordered to meet and confer and agree on a joint proposed Judgment which is consistent with this Order. The parties shall lodge the joint proposed Judgment with the Court on or before November 19, 2019. In the unlikely event that counsel are unable to agree upon a joint proposed Judgment, the parties shall each submit separate versions of a proposed Judgment along with a Joint Statement setting forth their respective positions no later than November 19, 2019.

IT IS SO ORDERED.

DATED: November 15, 2019

Honorable John F. Walter
United States District Judge

Exhibit 6

September 6, 2019

RAV Case # 314442

Hello,

I have tried reaching you at (323)229-9067 regarding the buyback of your 2016 Ford Transit Van. I would like to go over the options available to you, make sure I have the correct information, and go through the documents needed to proceed with your case. Below are the options available to you for the manufacturer buyback. Please review these options, and call me at (877)477-1023x1914 with the option you would like to go with. Make sure you have your case number when you do call that way we can look up your information regarding your case. If you do not contact me by close of business (Eastern Standard Time) on Wednesday, September 11th, I will be taking the necessary steps to close your case.

Option One: Repurchase

- Ford Motor Company [FMC] will pay off your current lienholder after the vehicle is surrendered.
- You will be reimbursed for any down payments and payments, minus usage, negative equity, late fees, aftermarket contracts, items, or accessories (if they don't fall within the refund).
- Any payments made on the vehicle that are not included in the Repurchase figures will be refunded once the buyback is complete.
- You will remain responsible for any loan payments until the buyback is complete.
- If you choose to accept the Repurchase Option, a private offer will be provided to you which will allow for a discount on a new Ford vehicle (exclusions apply), if you choose to purchase another.
- Any questions about the repurchase option?

Option Two: Replacement

- Ford Motor Company [FMC] will pay off your current lienholder after the vehicle is surrendered.
- You will pick out a new Ford vehicle.
  (It does not have to be the same model, however it does need to be a new vehicle)
- You will remain responsible for the current loan balance, usage, and upgrade charges.
- If your vehicle is New, the upgrade cost would be the difference between the MSRP of your current vehicle and the new vehicle.
- If your vehicle is Pre-Owned, the upgrade cost would be the difference between the base price of your current vehicle and the memo invoice of the new vehicle.
- Any questions about the replacement option?

Substitution of Collateral

- This option is only available if your lender supports this type of transaction.
- You will keep your current loan and everything regarding your loan will remain the same.
- Same payments, same due date, same everything.
- You will be responsible for any usage, upgrade charges, and other out-of-pocket amounts.
- These amount will be paid at the time of surrender in certified funds.
- There is no payoff associated with a substitution.
- Do you have any questions about substitution of collateral?

EXHIBIT
0009
Marcos Ramirez Band
08-05-2021

September 6, 2019

BBAY Case # 314442

Hello,

I have tried reaching you at (323)229-9067 regarding the buyback of your 2016 Ford Transit Van. I would like to go over the options available to you, make sure I have the correct information, and go through the documents needed to proceed with your case. Below are the options available to you for the manufacturer buyback. Please review these options, and call me at (877)477-1023x1914 with the option you would like to go with. Make sure you have your case number when you do call that way we can look up your information regarding your case. If you do not contact me by close of business (Eastern Standard Time) on Wednesday, September 11th, I will be taking the necessary steps to close your case.

Option One: Repurchase

- Ford Motor Company [FMC] will pay off your current lienholder after the vehicle is surrendered.
- You will be reimbursed for any down payments and payments, minus usage, negative equity, late fees, aftermarket contracts, items, or accessories (if they don't fall within the refund).
- Any payments made on the vehicle that are not included in the Repurchase figures will be refunded once the buyback is complete.
- You will remain responsible for any loan payments until the buyback is complete.
- If you choose to accept the Repurchase Option, a private offer will be provided to you which will allow for a discount on a new Ford vehicle (exclusions apply), if you choose to purchase another.
- Any questions about the repurchase option?

Option Two: Replacement

- Ford Motor Company [FMC] will pay off your current lienholder after the vehicle is surrendered.
- You will pick out a new Ford vehicle.
(It does not have to be the same model, however it does need to be a new vehicle)
- You will remain responsible for the current loan balance, usage, and upgrade charges.
- If your vehicle is New, the upgrade cost would be the difference between the MSRP of your vehicle and the new vehicle.
- If your vehicle is Pre-Owned, the upgrade cost would be the difference between the base [illegible] vehicle and the memo invoice of the new vehicle.
- Any questions about the replacement option?

- [illegible] your lender supports this type of transaction.
- [illegible] anything regarding your loan will remain the same.
- [illegible] anything.
- You will be responsible for [illegible] charges, and other out-of-pocket amounts.
- These amounts will be due to surrender in certified funds.
- There is no [illegible] option.
- Do you have any questions of collateral?

EXHIBIT
0009
Marcos Ramirez Band
08-05-2021

Notice

- If you are considering a substitution or new-finance replacement, I highly suggest finding the vehicle you want to get into, but DO NOT sign any documentation or paperwork with the dealership.
- Dealerships will often encourage you to do so, or try to contract you, but that is not consistent with a manufacturer buyback.
- Only one vehicle can be chosen to calculate replacement figures.
- What I need from you once you choose a substitution vehicle, is the VIN and the name of the sales manager that you speak with at the dealership.
- We can assist with this process if this is the option you choose to go with.

cuments

order to continue, I will request the following documents:

- Copy of Vehicle Registration (Must be current)
- Copy of Driver License
- Bill of Sale or Finance Contract from the original purchase of the vehicle
- Payment History with breakdown of interest and principle
- Payoff information with per diem and good through date
- Copy of title (if customer held state/paid off)
- Remarks

Turnaround time goal is about 30 days.

Carolyn Dulik | Repurchase Coordinator
Ford Reacquired Vehicle Headquarters
877-1023x1914| F 877.489.3091
Dulik@fordrav.com

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Attorneys for Defendants
FORD MOTOR COMPANY and
CENTRAL FORD AUTOMOTIVE, INC.
dba CENTRAL FORD

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

MARCOS RAMIREZ BANDA aka MARCOS RAMIREZ,

Plaintiff,

vs.

CENTRAL FORD AUTOMOTIVE, INC. dba CENTRAL FORD; FORD MOTOR COMPANY, a Delaware Corporation; and DOES 1 through 10, inclusive,

Defendants.

CASE NO. 20STCV26828
Hon. Barbara A. Meiers
Dept. 12

DEFENDANTS FORD MOTOR COMPANY'S AND CENTRAL FORD AUTOMOTIVE, INC. DBA CENTRAL FORD'S

(1) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION; AND

(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

[Separate Statement of Undisputed Material Facts; Declaration of Robert A. Schultz and [Proposed] Order filed concurrently herewith]

DATE: December 10, 2021
TIME: 10:00 a.m.
DEPT.: 12
RES ID: 063179910715

Complaint Filed: June 16, 2020
Jury Trial Date: January 18, 2022

EX D

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on December 10, 2021 at 10:00 a.m., in Department 12 of the above-entitled court located at 111 North Hill Street, Los Angeles, California 90012, Defendants Ford Motor Company ("Ford") and Central Ford Automotive, Inc. dba Central Ford, a California Corporation ("Central Ford") (collectively, "Defendants") will, and hereby do, move for summary judgment or, in the alternative, summary adjudication as to each of the causes of action in Plaintiff Marcos Ramirez Banda aka Marcos Ramirez's ("Plaintiff") Complaint ("Motion"). Defendants' Motion is brought pursuant to California Code of Civil Procedure Section 437c and California Rule of Court 3.1350.

The Motion is brought on the grounds that: (1) Plaintiff cannot present evidence to prove his first through third causes of action against Ford under the Song-Beverly Consumer Warranty Act because Ford complied with its obligations and offered to repurchase or replace Plaintiff's vehicle before Plaintiffs ever filed suit; (2) Plaintiff's fourth cause of action for negligent repair against Central Ford is barred by the economic loss doctrine; and (3) Plaintiff's fourth cause of action for negligent repair against Central Ford is barred because Plaintiff cannot prove breach or damages since Plaintiff only presented the vehicle to Central Ford for repair on one occasion and all work was performed under warranty at no cost to Plaintiff.

Alternatively, Defendants seek summary adjudication of the following issues:

- ISSUE NO. 1: Plaintiffs' First Cause of Action For Breach of Express Warranty Against Ford is Barred Because Ford Made A Compliant Pre-Suit Offer To Repurchase Or Replace Plaintiffs' Vehicle;
- ISSUE NO. 2: Plaintiffs' Second Cause of Action For Breach of Implied Warranty Against Ford is Barred Because Ford Made A Compliant Pre-Suit Offer To Repurchase Or Replace Plaintiffs' Vehicle;
- ISSUE NO. 3: Plaintiffs' Third Cause of Action For Breach of Express Warranty—Violation of the Song Beverly Act, Section 1793.2—is Barred Because Ford Made A Compliant Pre-Suit Offer To Repurchase Or Replace Plaintiffs' Vehicle;
- ISSUE NO. 4: Plaintiff's Fourth Cause of Action for Negligent Repair Against

Central Ford is Barred By The Economic Loss Doctrine;

- ISSUE NO. 5: Plaintiff's Fourth Cause of Action for Negligent Repair Against Central Ford Is Barred Because Plaintiff Cannot Prove Breach; and
- ISSUE NO. 6: Plaintiff's Fourth Cause of Action for Negligent Repair Central Ford is Barred Because Plaintiff Cannot Prove Damages.

Defendants' Motion is based on this Notice of Motion and Motion, the Memorandum of Points and Authorities, the Declaration of Robert A. Schultz and exhibits thereto, the Separate Statement of Undisputed Material Facts, a [Proposed] Order, all other documents in the record, and any arguments that may be presented at any hearing on the Motion.

DATED: September 24, 2021

MORTENSON TAGGART LLP

By: 

Michael D. Mortenson
Craig A. Taggart
Robert A. Schultz
Attorneys for Defendants
FORD MOTOR COMPANY AND
CENTRAL FORD

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Defendants Ford Motor Company ("Ford") and Central Ford Automotive, Inc. dba Central Ford ("Central Ford") (collectively, the "Defendants") respectfully request that the Court grant summary judgment or, in the alternative, summary adjudication of each of the claims in Plaintiff Marcos Ramirez Banda aka Marco Ramirez's ("Plaintiff") complaint ("Complaint").

This is a Song-Beverly Act case that never should have been filed. Ford offered to repurchase Plaintiff's vehicle in full compliance with the Song-Beverly Act before Plaintiff ever filed suit. But Plaintiff rejected Ford's offer in an attempt to manufacture a lawsuit to pursue civil penalties and attorneys' fees. Plaintiffs omit these dispositive facts from their Complaint. In the past few years, numerous federal courts have granted summary judgment for Ford on similar facts and based on identical offer letters, and Ford recently prevailed on another summary judgment in another department in the Los Angeles Superior Court on similar facts. The Court should grant summary judgment here for the same reasons.

Plaintiffs sued Defendants asserting three causes of action under the Song-Beverly Act for: (1) breach of express warranty, (2) breach of implied warranty, and (3) violation of Section 1793.2 of the Song-Beverly Act. Plaintiffs' Song-Beverly causes of action are based on allegations that he purchased a used 2016 Ford Transit ("Vehicle"), and subsequently experienced alleged problems with the Vehicle in violation of express and implied warranty obligations Defendants purportedly owed to Plaintiff. Further, Plaintiff asserts a fourth cause of action against Central Ford based on allegations that it performed some unidentified "negligent repair."

Summary judgment should be granted as to all causes of action for three reasons:

First, Plaintiff cannot establish any of his three Song-Beverly Act causes of action as a matter of law because the undisputed facts establish that Ford made a prompt offer to repurchase or replace his vehicle in full compliance with Ford's obligations under the Song-Beverly Act. Ford made the repurchase offer to Plaintiff shortly after Plaintiff called Ford and ***before*** Plaintiff

ever filed his lawsuit. Although Ford complied with the Song-Beverly Act and offered Plaintiff the relief he purportedly wanted, Plaintiff rejected Ford's offer. Instead, Plaintiff filed suit.

Significantly, courts have uniformly granted summary judgment for Ford in cases where, as here, Ford made a pre-suit repurchase offer, but the plaintiffs—while represented by the same counsel representing Plaintiff in this case—failed to accept Ford's offer. *See, e.g.*, *Gonzalez v. Ford Motor Co.*, No. LA CV 19-00652 PA (ASx), 2019 WL 6122554, at *6-8 (C.D. Cal. Mar. 22, 2019) (granting summary judgment for manufacturer on express and implied warranty claims based on offer to repurchase or replace vehicle); *Nuñez v. Ford Motor Co.*, No. CV 18-9423-JFW (JCx), at *4-10 (C.D. Cal. Nov. 15, 2019) (same); *De Leon v. Ford Motor Co.*, No. CV-187975-PSG-(FFMx), 2019 WL 7195325, at *6 (C.D. Cal. Nov. 13, 2019) (same). Accordingly, Ford is entitled to summary judgment on each of Plaintiff's Song-Beverly causes of action.

Second, Central Ford is entitled to summary judgment or summary adjudication of Plaintiff's fourth cause of action for negligent repair because it is barred by the economic loss doctrine.

Third, Plaintiff's negligent repair cause of action is also barred because Plaintiff cannot establish that Central Ford breached any duty owed to Plaintiff or that Plaintiff has suffered any damages as a result of Central Ford conduct. Plaintiff presented the Vehicle to Central Ford for repair on only one occasion, and Plaintiff did not pay a penny for the alleged repair.

In sum, because Plaintiff cannot establish any cause of action against Defendants, the Court should grant summary judgment, or, at a minimum, summary adjudication as to all causes of action in Plaintiff's Complaint.

II. STATEMENT OF FACTS

On July 13, 2018, Plaintiff Marcos Ramirez Banda aka Marcos Ramirez purchased a used 2016 Ford Transit Connect (the "Vehicle") from South Bay Ford in Hawthorne, California. (Defendants' Separate Statement of Uncontroverted Material Facts ("UF") 1.) Plaintiff brought the vehicle to defendant Central Ford for repair on only one occasion on January 14, 2020. (UF 9.) However, Central Ford performed the services under warranty at no cost to Plaintiff. (UF

10.) Plaintiffs do not claim any personal injuries resulting from Central Ford's alleged negligent repair. (UF 8.)

On or around July 25, 2019, Plaintiff called Ford to complain about the alleged issues with the Vehicle and requested that Ford repurchase or replace the Vehicle. (UF 2.) At this time, Plaintiff was represented by counsel. (UF 3.) On August 5, 2019, Ford sent its offer letter to Plaintiff offering to repurchase or replace the Vehicle. (UF 4.) On September 6, 2019, Ford sent Plaintiff a letter detailing three options for him, and requesting further documentation from him. (UF 5.) Plaintiff did not accept Ford offer. (UF 6.) Plaintiff's refusal to accept Ford's offer is presumably based on the guidance of the same counsel involved in all of the other cases referenced above courts have entered summary judgment in favor of Ford. On July 16, 2020, Plaintiff filed suit against Ford and Central Ford. (*See* UF 7.)

III. ARGUMENT

A. Legal Standard

"A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit." Code Civ. Proc. § 437c(a)(1). "In order to prevail on a motion for summary judgment, a defendant must either disprove an essential element of the plaintiff's cause of action or prove an affirmative defense that would bar such cause of action." *Velasquez v. Truck Ins. Exch.*, 1 Cal. App 4th 712, 717 (1991) (emphasis added). "A motion for summary adjudication may be made by itself or as an alternative to a motion for summary judgment and shall proceed in all procedural respects as a motion for summary judgment." Code Civ. Proc. § 437c(f)(2).

Summary judgment and/or summary adjudication "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Code Civ. Proc. § 437c(c). In moving for either form of relief, "[a] defendant . . . has met his or her burden of showing that a cause of action has no merit if that party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action." Code Civ. Proc. § 437c(p)(2). "Once the defendant . . . has met that burden, the

burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto." *Dominguez v. American Suzuki Motor Corp.*, 160 Cal. App. 4th 53, 57 (2008) (citing Code Civ. Proc., § 437c(p)(2)) (citation omitted).

B. Defendants Are Entitled To Summary Judgment Because Ford Made A Compliant Pre-Suit Offer To Repurchase Plaintiff's Vehicle

The Court should grant summary judgment or summary adjudication on each of Plaintiff's three causes of action for violations of the Song-Beverly Act because Ford fully complied with its obligations under the Song-Beverly Act. Specifically, Plaintiff cannot prove these three causes of action because he has no evidence to satisfy an essential element of these claims—namely, that Ford failed to promptly offer to repurchase or replace the Vehicle. This is a sufficient basis to grant summary judgment as to each of Plaintiff's Song-Beverly Act causes of action.[1]

The Song-Beverly Act provides in pertinent part:

> If the manufacture or its representative in this state is unable to service or repair a new motor vehicle . . . to conform to the applicable express warranties after a reasonable number of repair attempts, the manufacturer shall either promptly replace the new motor vehicle in accordance with subparagraph (A) or promptly make restitution to the buyer in accordance with subparagraph (B). However, the buyer shall be free to elect restitution in lieu of replacement, and in no event shall the buyer be required by the manufacturer to accept a replacement vehicle.
>
> (A) In the case of replacement, the manufacturer shall replace the buyer's vehicle with a new motor vehicle substantially identical to the vehicle replaced. The replacement vehicle shall be accompanied by all express and implied warranties that normally accompany new motor vehicles of that specific kind. The manufacturer also shall pay for, or to, the buyer the amount of any sales or use tax, license fees, registration fees, and other official fees for which the buyer is obligated to pay in connection with the replacement, plus any incidental damages to which the buyer is entitled under Section 1794, including but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

[1] Plaintiff's cookie-cutter Complaint pleads (1) beach of express warranty, (2) breach of implied warranty (3) violation of the Song-Beverly Act Section 1793.2; and (4) negligent repair. The third cause of action is largely, if not completely duplicative of Plaintiff's breach of express warranty cause of action.

prompt offer to repurchase or replace the plaintiff's vehicle and rejecting argument that the offer letter and subsequent financial offer were deficient and not prompt); *Rivera,* 2020 WL 1652534, at *6-14 (granting summary judgment and rejecting arguments that offer was defective).

In this case, similar to *Gonzalez*, *Rupay*, *De Leon, Nuñez and Rivera*, it is undisputed that Ford made a prompt offer to repurchase or replace Plaintiff's Vehicle after Plaintiff called Ford in July 2019. (UF 2, 4-5.) It is also undisputed that Plaintiff did not accept Ford's offer. (UF 6.) Notably, Plaintiff was represented by counsel at the time he initially contacted Ford and ultimately did not accept Ford's offer. (UF 3.) Plaintiff instead chose to file this lawsuit in a transparent and improper attempt to seek civil penalties and attorneys' fees. (UF 7-10.)

While Ford cannot force Plaintiff to accept its offer to repurchase or replace his Vehicle, Plaintiff cannot reject a compliant offer to manufacture a claim. In fact, this is precisely what happened in *Gonzalez*, *Nuñez*, *Rivera*, and *De Leon*. And those courts also found that Ford's offer letter was completely compliant with the Act and provided a sufficient basis to grant summary judgment for Ford. *See also Dominguez*, 160 Cal. App. 4th at 59-60 (granting summary judgment for Suzuki based on pre-suit repurchase offer noting "Dominguez did not file suit to require Suzuki to comply with Song–Beverly. It filed suit to recover the civil penalty and/or attorney fees.")

In sum, Plaintiff cannot satisfy his burden of presenting evidence to prove that Ford did not promptly offer to repurchase or replace his vehicle because the undisputed facts establish that Ford did offer to repurchase or replace Plaintiff's vehicle, but Plaintiff did not accept the offer. As a result, the Court should grant summary judgment on each of Plaintiff's three Song-Beverly Act causes of action in the Complaint.

C. Central Ford Is Entitled To Summary Judgment On Plaintiff's Negligent Repair Cause Of Action.

"To succeed in a claim for negligent repair, a plaintiff must establish the well-known elements of a negligence claim: duty, breach, causation and damages." *Hayes v. FCA US LLC*,

No. CV 20-3183-DMG (JCX), 2020 WL 2857490, at *2 (C.D. Cal. June 2, 2020) (citing *Burgess v. Sup. Ct.*, 20 Cal. 4th 1067, 1072 (1992)). On summary judgment, where a defendant

> [h]as met his or her burden of showing that a cause of action has no merit [by showing] that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to that cause of action . . . the burden shifts to the plaintiff . . . to show that a triable issue of one or more material facts exists as to that cause of action or a defense thereto.

Code Civ. Proc. § 437 (c)(p)(2). Central Ford is entitled to summary judgment or summary adjudication on Plaintiff's negligent repair cause of action because (1) Plaintiff's negligent repair claim is barred by the economic loss doctrine; and (2) Plaintiff cannot prove breach of duty or damages because Plaintiff presented the Vehicle to Central Ford for repair on only one occasion and the repair was performed under warranty at no cost to Plaintiffs.

1. The Economic Loss Rule Bars Plaintiff's Negligent Repair Claim.

"The economic loss rule precludes recovery in tort where a plaintiff's damages consist solely of economic loss." *Pilgrim v. Gen. Motors Co.*, No. CV 15-8047-JFW (EX), 2020 WL 7222098, at *10 (C.D. Cal. Nov. 19, 2020) (citing *Seely v. White Motor Co.*, 63 Cal. 2d 9, 17–18 (1965), *superseded by statute on other grounds.*) "California Courts define economic loss as 'damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits—without any claim of personal injury or damages to other property.'" *Dep't of Water & Power v. ABB Power T&D Co.*, 902 F. Supp. 1178, 1186 n.4 (C.D. Cal. 1995). As the Court in *Pilgrim* explained, "unless the purchaser 'can demonstrate harm above and beyond a broken contractual promise,' the economic loss rule requires that he recover in contract for purely economic loss." *Pilgrim*, 2020 WL 7222098, at *10 (quoting *Robinson Helicopter Co., Inc. v. Dana Corp.*, 34 Cal. 4th 979, 988 (2004) (holding "the economic loss rule prevents the law of contract and the law of tort from dissolving one into the other") (internal citation and quotation marks omitted)).

Here, Plaintiff's negligent repair claim is based on conclusory allegations that Central Ford negligently repaired Plaintiff's Vehicle. (UF 7.) Even assuming, *arguendo*, that Plaintiff

could prove such allegations (which they cannot for the reasons explained below), Plaintiff's claim is barred by the economic loss rule. To be sure, Plaintiff's claim is essentially that Central Ford negligently repaired the Vehicle one time under warranty. (*Id.; see* Compl. at ¶¶ 9, 57-61 (Fourth Cause of Action).) There is no personal injury claimed. (UF 8.) Rather, Plaintiff only seeks damages for the cost to repair the Vehicle. (*Id.*, *see* Compl., Prayer for Relief.) However, the economic loss rule, as applied by the California Supreme Court in *Robinson*, precludes such claims.

2. Plaintiffs Cannot Establish Breach of Duty or Damages.

Plaintiffs cannot establish that Central Ford breached any duty it owed to Plaintiff because Plaintiff presented his Vehicle to Central Ford for repair on only one occasion. Although Plaintiff's Complaint alleges that "Plaintiffs delivered the Subject Vehicle to Defendant CENTRAL FORD for repair of (sic) on numerous occasions" (Compl., ¶ 58), this allegation is false. The undisputed facts show that Plaintiffs only presented the Vehicle to Central Ford on one occasion. (UF 9.) Central Ford cannot be liable for an alleged failure to repair alleged issues with the Vehicle during a single visit. The undisputed facts further show that Plaintiff never returned to Central Ford after his first and only visit, thereby depriving Central Ford of the ability to continue to diagnose and attempt to repair any issues with the Vehicle. (*Id.*)

Even if Plaintiff could prove breach, they cannot prove that Central Ford conduct caused them any damages. Plaintiff did not pay Central Ford a penny for the repairs it performed because the repairs were covered under warranty. (UF 10.) Because Plaintiff did not pay Central Ford for any repair, Plaintiff cannot establish that they were damaged by Central Ford's alleged misconduct and Central Ford is entitled to summary judgment or summary adjudication of Plaintiff's fourth cause of action for negligent repair.

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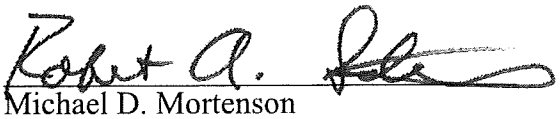
IV. CONCLUSION

Based on the foregoing, Defendants Ford Motor Company and Central Ford respectfully request that the Court grant summary judgment, or at a minimum summary adjudication, on each of Plaintiff's causes of action in the Complaint.

DATED: September 24, 2021

MORTENSON TAGGART LLP

By: 

Michael D. Mortenson
Craig A. Taggart
Robert A. Schultz
Attorneys for Defendants
FORD MOTOR COMPANY AND
CENTRAL FORD

PROOF OF SERVICE

STATE OF CALIFORNIA)
) ss
COUNTY OF ORANGE)

I am employed by Mortenson Taggart LLP in the County of Orange, State of California. I am over the age of 18 and not a party to the within action. My business address is: 300 Spectrum Center Drive Plaza Suite 1100, Irvine, CA 92618. On September 24, 2021, I served the within documents:

DEFENDANTS FORD MOTOR COMPANY'S AND CENTRAL FORD AUTOMOTIVE, INC. DBA CENTRAL FORD'S

(1) NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION; AND

(2) MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

☒	**By electronic service** by transmitting via my electronic service address (kthurmond@mortensontaggart.com) the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

Steve Mikhov
Amy Morse
KNIGHT LAW GROUP, LLP
10250 Constellation Boulevard
Suite 2500
Los Angeles, CA 90067
Telephone: (310) 552-2250
Facsimile: (310) 552-7973
emailservice@knightlaw.com
ATTORNEYS FOR PLAINTIFF

I declare that I am employed in the office of a member of the bar of this court whose direction the service was made. I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on September 24, 2021, at Irvine, California.

Kaelyn Thurmond
Kaelyn Thurmond